Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1170

THE ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Petitioner,

against

JAMES MIZELL,

Respondent.

REPLY BRIEF

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A. If Chief Justice Marshall's admonition in *United States* v. *Burr,* 8 U.S. 287, 4 Cranch 470 (1807), concerning the overriding of *all* former precedent is to have any significance, *Crist* v. *Bretz,* 437 U.S. 28 (1978) was new and overriding law on the aspect of the Double Jeopardy guarantee *sub judice* in jurisdictions theretofore not adopting the Federal rule. The very fact that this Court in *Crist* found it necessary to ask the parties to address the issue of whether the question of when jeopardy attaches was an integral part of the constitutional guarantee, is an indication that it was not at all clear in 1971 that the rule of *Downum* v. *United States,* 372 U.S. 734 (1963) had been made applicable to the states by virtue of *Benton* v. *Maryland,* 395 U.S. 784 (1969).

Petitioner would not necessarily overrule *Robinson* v. *Neil,* 409 U.S. 505 (1973). Rather, the narrower remedy of limiting *Robinson* v. *Neil* to its underlying facts on the

question of retroactivity might be appropriate. Compare *Harlan*, J. concurring and dissenting in *Mackey* v. *United States*, 401 U.S. 667 (1971) with the result in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971).

B. Respondent's attempt to limit the question of "manifest necessity" to the single circumstance of calendar congestion is specious. The entire circumstantial context of the discharge of the jury must be taken into account in determining its manifest necessity. See *United States* v. *John*, 400 U.S. 470 (1971).

Here, the circumstantial context of the discharge of the jury included: (a) the rights of other accuseds to a speedy trial and their need for the jurors' services; (b) a legitimate state policy of implementing this right; (c) a legitimate state policy of clearing calendar congestion in criminal courts; (d) lack of elaboration by respondent's trial counsel to the Court at the critical time on the double jeopardy issue; (e) lack of prosecutorial negligence or intent to harass this respondent; (g) the retroactive voiding by a United States District Judge of a discretionary determination by a state trial judge relying on the authority of the highest court of that state.

The issue is indeed broad. Under what circumstances may Federal courts interfere with the orderly administration of justice by the States?

C. The assertion that appeal has not been timely taken is inaccurate. Petitioner filed a notice of appeal to the United States Court of Appeals for the Second Circuit on or about February 22, 1979 from the judgment of the United States District Court on remand, entered on January 15, 1979. The appeal was filed and the appropriate fee paid in the Second Circuit on March 2, 1979. The theory upon which this appeal was taken is that the alternative relief requested in petitioner's motion made

January 23, 1979 and argued January 26, 1979 in the District Court, was in fact an application for reargument and modification or amendment of the judgment, as well as to vacate. Thus, petitioner's time to appeal under Rule 4 (a) Federal Rules of Appellate Procedure was automatically extended thirty days from the date of the decision thereon.

In addition, petitioner has timely filed on March 1, 1979 a Notice of Appeal from the District Court's order, entered January 30, 1979, denying the motion above referred to; be it one to vacate, modify or amend. The issues created by the District Court's judgment on remand are therefore very much alive and the District Court's denial of petitioner's Rule 4(a) motion on February 27, 1979 does not affect their viability.

In support of the above assertions, a copy of the transcript of the argument of petitioner's motion is annexed as an exhibit. In addition, a reading of the exhibit demonstrates, we submit, the confusion of the parties regarding the procedures to be followed where a judgment in favor of a habeas petitioner is rendered after his release from custody. It further demonstrates, we submit, the need for guidance in this area, be it legislative or judicial.

If, as petitioner believes, the judgment is effective upon entry, and need not be served to place the persons in custody of the records of petitioner's conviction on notice thereof, petitioner and these persons, may be exposed to liability. Compare *Ex Parte Young*, 209 U.S. 123 (1908).

Thus, the issue is not only ripe for this Court's consideration, it is also rather urgent and cries out for this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted in all respects.

Dated: New York, New York
March 2, 1979

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Petitioner

GEORGE D. ZUCKERMAN
Assistant Solicitor General

JOHN M. FARRAR
Assistant Attorney General
of Counsel

Exhibit.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

76 C 2161

JAMEZ MIZELL,

Plaintiff

—against—

ATTORNEY GENERAL OF THE STATE OF NEW YORK
and another

Defendants

United States Courthouse
Brooklyn, New York
January 26, 1979
10 a.m.

Before:

HONORABLE EUGENE H. NICKERSON,
U.S.D.J.

Appearances:

ROBERT ABRAMS, Esq.
Attorney General of the State
of New York, 47th Floor
2 World Trade Center
New York, N.Y. 10047

By: JAMES M. FARRAR, Esq.
Assistant Attorney General
Appeals Bureau

STEVEN LLOYD BARRETT, Esq.
Federal Defender Service

The Clerk: Mizzell.

The Court: All right, would you like to be heard?

First, let me ask you what you care about this? If that statute is changed and this fellow has completed his probation, has he not?

Mr. Farrar: He has been released from custody.

The Court: He has been released from custody.

Mr. Farrar: Right.

The Court: Why do you care?

Mr. Farrar: Well, because it depends upon whether or not, and I am frankly very troubled because I am not sure of the answer to the question, whether or not we have a situation where the order that is set forth in this particular form might create a constitutional problem with regard to principles of Federalism, and also because the custodians of the records are not going to—

The Court: So what? There have been other orders issued identical to this by other District Courts. So what.

So if it is wrong, what difference does it make? Someone will correct it in the Second Circuit eventually.

Mr. Farrar: Frankly, your Honor, I'm trying to obviate that.

The Court: Well, what difference does it make to you? Is this just an academic exercise?

Mr. Farrar: Well, no, and I will give you an example: In Ex parte Young it was held that the Attorney General was stripped of immunity from suit when he was attempting to enforce an unconstitutional statute.

Now, we have here what your Honor has ruled to be an unconstitutional conviction.

The Court: But that statute is gone now. It has been repealed. The statute that is now on the books says that jeopardy attaches when the jury—

Mr. Farrar: No, I am not talking about that. What I am saying is in the Ex parte Young situation as applied

to enforcement of the relief that the petitioner asks for here, which I assume is—

The Court: Well, eventually isn't his conviction going to be voided, assuming that cert. is not granted? Is all of this really about getting some time for the cert. thing?

Mr. Farrar: No, your Honor. Quite frankly I told Mr. Barrett this morning that if you were to modify your order and order us to proceed with the expungement of the record, as far as the State is concerned, we would advise the Office of Court Administration of the State of New York that the conviction has been declared null and void and that they should proceed accordingly, because apparently all that is involved is computer printouts—

The Court: And it is an affront to the great State of New York.

Mr. Farrar: The sovereignty of the State of New York.

The Court: All right, I will hear you on the merits. Go ahead.

Mr. Farrar: Well, first of all, I would like to hand up to your Honor a copy of the petition in printed form, our petition for cert.

The Court: Thank you.

Mr. Farrar: When the Court of Appeals decided that the matter should be remanded for appropriate relief because the petitioner had been released from custody, it raised for the first time the issue of the appropriateness of the relief. And it stated in its decision, the last page of the decision of the Court, that Mizell may wish to apply for appropriate relief.

We submit that this constitutes a requirement that the petition or the argument of the petitioner be amended to request appropriate relief. And that implies an obligation of notice to the State of the ability of the State to come forward and possibly raise certain defenses with respect to expungement, because there is no constitutional right of expungement, not as a matter of right anyway, and this had not been done.

Exhibit.

Now, with respect to the second part, the District Court said in decretal portions of their opinion, they suggest that the Attorney General be directed to proceed in the State Courts to apply for the expungement of the records.

This was only a suggestion. And with respect to that, however, we feel that the Court off Appeals may have been aware of the possibility that the judgment in the form that it was rendered might offend principles of Federalism; might impinge upon the constitutional right of the State, and therefore in effect it might create a constitutional question where possibly none might exist if the Attorney General, who was a party to the proceeding, was directed to proceed to enforce the judgment.

Consequently, as officers of the court, we are bringing this application as quickly as we can to possibly modify the judgment to eliminate the issue by either directing the Attorney General to proceed in the State Courts or by directing the petitioner to proceed in the State Courts so as not to—so as to avoid a possible constitutional issue in the case and obviate an appeal of this case.

The Court: Do you want this, by the way, to be reported? Did you ask that a record be made?

Mr. Farrar: Well, I asked the reporter to be present. I will dispense with it.

The Court: Oh, no.

Mr. Farrar: I just don't know at this point, your Honor, frankly. I am very troubled by the situation.

The Court: Why, certainly.

Mr. Farrar: I don't know whether I am being frivolous or not, your Honor.

The Court: Well, you don't look frivolous, anyway.

Mr. Farrar: Thank you.

And I will say, as I mentioned to my adversary this morning, the State would be perfectly willing—the Attorney General would be perfectly willing to notify the State

Exhibit.

Office of Court Administration to put it on its computer, or whatever has to be done mechanically, to expunge a record of this conviction, if the Court would modify its judgment and order us to do so; that is all I am asking, because if it has not ordered us to do so I contend that there is a situation where there is an order ordering people who are not before the Court and who are not on notice in these proceedings to do certain things which might be in excess of its jurisdiction.

The Court: Well, the Attorney General of the great State of New York is before me.

Mr. Farrar: Yes.

The Court: Named as a defendant. But you say that that requires the Court—that the machinery of the courts are not before me and therefore I should let the Attorney General go back and ask those officers—

Mr. Farrar: Correct. There is one case, which is Grandison v. The Warden case, which is the District Court of Maryland. The Warden was a party. And the Court directed notice to the Attorney General, which they deemed would be sufficient. That is the closest case on point that I have been able to locate with respect to relief to be granted.

The Court: Yes.

Mr. Farrar: However, that is a District Court case, and it never went any further.

As I say, I feel to avoid any possible—I won't say "any possible," because it still is possible even if your Honor did order us to do something—there could be an appeal—but I frankly would doubt it.

The Court: Well, what would you like to say?

Mr. Barrett: Well, Mr. Farrar, I am certain, won't be surprised because I have said this on the telephone to him a number of times, that I am rather unclear on what the contention is on what the problem is that he foresees.

However, if I could respond to him on the merits, he

indicates that the decision requires that we apply for this relief and suggests that the order is void for that reason —and that judgment is void for that reason, I think it would be the next sentence in the decision that the Court of Appeals stated—

The Court: Well, do you apply for this relief if you have to?

Mr. Barrett: Surely. I would be happy to, The Court of Appeals' decision does say, "We leave it to the District Court to determine what relief should be granted."

I think it is simply a matter of granting relief in connection with granting a habeas corpus petition, which under normal circumstances is done without notice. It is part of the same procedure.

As far as Mr. Farrar's suggestion that there is something in this order that offends Federalism or impinges on the prerogatives of the State, again I have said to Mr. Farrar a number of times that I am not really clear on what he is getting at.

The Attorney General is the counsel to the State and all its bodies, and it would seem to me that since the Attorney General is a party and is counsel to the State, there will be no infringement on the State prerogatives by an order directing expungement.

The Court: Tell me this, when I enter this order, or if I adhere to the order, what do you physically do? Do you take it over to the State place where the judgment of conviction was entered and show it to them?

Mr. Barrett: What we normally do is take a copy of the order with the letter directed to the attention of not only the State but everybody we can think of—

The Court: Do you mean the Clerk of the Court?

Mr. Barrett: Yes, including the Department of Correction in the State.

The Court: And then you follow it up to see whether they actually do it?

Mr. Barrett: In our covering letter request we ask for a letter of confirmation that the order has been complied with. If in fact a covering letter does not return to us, we request it. If it is continually not given, we seek contempt against the body. In other words, there is one thing I should indicate, and that is that we would not be limiting ourselves to only one body. We would take this order also to the FBI, which is in cooperation with the State and would probably have this information, and we would take this matter to the various Federal agencies and State agencies. In other words, we would take this up and make every endeavor to get the record expunged.

Now, as far as Mr. Farrar's suggestion that he would go to the Court and file this, that would be fine with us. We would appreciate his cooperation. And so again I am not sure if there is a controversy here. The only reason—

The Court: So you would have no objection if I might change it, grant it, and not only declare it void, but also directed him to apply to the court.

Mr. Barrett: We would have no objection. It is an addition, and that is fine. So long as the order would not restrict it so that the only method of obtaining relief would be through the Attorney General, so we would still have the opportunity to go to other bodies that the Attorney General might not wish to go to to get this record expunged.

Mr. Farrar: I might point out, your Honor, that apparently as far as practicable the Federal Rules of Civil Procedure do apply to habeas corpus proceeding. You take a look at Rule 70, the rule regarding enforcement of a judgment, and a proceeding for contempt is where a judgment directs a party to do something. The form of your Honor's order does not really direct the party to do anything.

The Court: Well, except unless you construe it, that Maryland case, to be as against the State.

Mr. Farrar: Well, your Honor—

The Court: And that means all of its minions, and so forth.

Mr. Barrett: And, following that up, I am sure that the Attorney General's office itself has had no participation in any wrongdoing here. They certainly were not the original counsel in the trial court, and I would think that their appearance here is not as a representative of—

The Court: Is Maria Marcus still with the Attorney General?

Mr. Farrar: No, she is now an Associate Professor of Law at Fordham.

The Court: I thought I read that.

Mr. Farrar: A very, very nice lady.

The Court: All right. Then I will consider this. Thank you.

Mr. Farrar: I might add, your Honor, I think that the suggestion or the interpretation that counsel is making with respect to what he has to do is all well and good, but it is all an assumption on his part. In other words, what he has to do with this judgment, that he has got to go and serve it, and he has got to do all these things, well, if that's the case, maybe the Court might wish to make that explicit in the order.

The Court: Well, he can do what he wants to do.

Mr. Barrett: No, I just want an order.

The Court: I assume you will make every effort to see that your client is relieved of this unconstitutional judgment against him.

Mr. Barrett: May I make a comment?

The Court: Yes.

Mr. Barrett: In reality it is not the State but the Federal bodies that give the greatest problem as far as ex-

pungement. In the State, since the enactment of Article 160 expungement is a matter of course, and it is done rather freely, where the exact opposite rule is in the Federal Court. Expungement in Federal cases is limited to a few cases in the D.C. Circuit and a few cases involving illegal arrest. I have tried unsuccessfully in this circuit to have expungment in a case in which I thought there were many equities. And the fact is that there are insurmountable problems in the Federal Court. And that is why we wanted your order as a basis for going in and getting this.

Mr. Farrar: Your Honor, again that is something that I am not here representing the FBI, and they certainly are not a party to this proceeding. And I might add—

The Court: I suppose they have to take notice, however, of the orders and judgments of the District Court. And all he is doing is directing their attention to it.

All right, thank you, gentlemen.

Mr. Barrett: Thank you, Judge. It is nice seeing you.